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UNITED STATES OF AMERICA,

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Plaintiff,

) 3:12-CR-0058-LRH-WGC

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v.

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) ORDER

F. HARVEY WHITEMORE

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Defendant.

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## I. Facts and Background

<sup>1</sup> Refers to the court's docket number.

1 In keeping with federal law, the campaign committee filed a required contribution report  
2 with the Federal Election Commission ("FEC") on April 15, 2007. This report allegedly contained  
3 false information identifying Whittemore's employees and family members, rather than  
4 Whittemore himself, as the source of the campaign funds.

5 On June 6, 2012, the Grand Jury returned a four (4) count indictment against defendant  
6 Whittemore charging him with: (1) making excessive campaign contributions in violation of  
7 2 U.S.C. § 441a(a)(1) ("Count 1"); (2) making contributions in the name of another in violation of  
8 2 U.S.C. § 441f ("Count 2"); (3) false statement to a federal agency in violation of 18 U.S.C.  
9 § 1001(a)(2) ("Count 3"); and (4) false statement to a federal agency in violation of 18 U.S.C.  
10 § 1001(a)(2) ("Count 4"). Doc. #1. Following his indictment, Whittemore filed the present motion  
11 to exclude or limit "other acts" evidence, or in the alternative, for a separate trial of Count 4 of the  
12 Indictment. Doc. #120.

## 13 **II. Discussion**

14 In his motion, Whittemore seeks an order from the court either (1) excluding "other acts"  
15 evidence, or (2) bifurcating this action and having a separate trial on Count 4. *See* Doc. #120. The  
16 court shall address both arguments below.

### 17 **A. Motion to Exclude**

18 The United States has notified Whittemore and the court of its intention to introduce "other  
19 acts" evidence pursuant to Federal Rule of Evidence 404(b).<sup>2</sup> *See* Doc. #87. In response,  
20 Whittemore filed the present motion arguing that the "other acts" evidence identified by the United  
21 States should be excluded because it is unfairly prejudicial under Federal Rule of Evidence 403.  
22 *See* Doc. #120. Rule 403 provides in pertinent part that "[t]he court may exclude relevant evidence  
23 if its probative value is substantially outweighed by . . . unfair prejudice." FED. R. EVID. 403.

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25 <sup>2</sup> Rule 404(b) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the  
26 character of a person in order to show action in conformity therewith [but it] may, however, be admissible for  
other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence  
of mistake or accident." FED. R. EVID. 404(b).

1 Whittemore contends that the “other acts” evidence identified by the government is highly  
2 prejudicial to his defense because it would allow the jury to infer his guilt simply based on similar  
3 acts and not the acts charged in the indictment.

4 In opposition, the United States argues that the “other acts” evidence is highly probative of  
5 Whittemore’s intent and makes it more probable than not that he asked the conduits to make  
6 political contributions he or she would not otherwise have made without the defendant providing  
7 money to cover the contributions. *See* FED. R. EVID. 401 (stating the evidence is relevant if it has  
8 “any tendency to make the existence of any fact that is of consequence to the determination of the  
9 action more probable or less probable than it would be without the evidence.”). Further, the mere  
10 fact that these contributions spanned a number of years makes it more probable than not that  
11 Whittemore’s conduct was not just a one-time mistake, but was part of a pattern of conduct that  
12 portrayed a plan, scheme and common practice.

13 The court has reviewed the documents and pleadings on file in this matter and agrees that  
14 the “other acts” evidence is probative of Whittemore’s intent, knowledge, and absence of mistake  
15 or accident which are appropriate bases to admit such “other acts” evidence. *See* FED. R. EVID.  
16 404(b). Further, the court finds that the prejudicial effect of this evidence is substantially  
17 outweighed by its probative value as the evidence is highly probative to Whittemore’s intent,  
18 knowledge, and absence of mistake and is not inflammatory or likely to confuse the jury. Moreover,  
19 Rule 404(b) is a “rule of inclusion - not exclusion.” *United States v. Curtin*, 489 F.3d 935, 944 (9th  
20 Cir. 2007); *see also, United States v. McKoy*, 771 F.2d 1207, 1213 (9th Cir. 1985) (holding that  
21 other acts evidence is generally admissible “except where the evidence proves only the defendant’s  
22 criminal disposition.”). Accordingly, the court shall deny the motion to exclude the United State’s  
23 identified “other acts” evidence.

#### 24 **B. Separate Trial**

25 Whittemore argues that if the court denies his request to exclude the “other acts” evidence  
26 then, in the alternative, the court should sever Count 4 from the Indictment and schedule a separate

1 trial on that issue pursuant to Rule 14 of the Federal Rules of Criminal Procedure. *See* Doc. #120.

2 Federal Rule of Criminal Procedure 14 provides that a district court may sever offenses or  
3 defendants if their joinder becomes prejudicial to the defendant. Fed. R. Crim. P. 14; *see also*  
4 *United States v. Gruttadauria*, 439 F. Supp, 2d 240, 253 (E.D. N.Y. 2006). A key factor in  
5 determining whether the risk of prejudice in a single trial of multiple counts is too great is the  
6 extent to which evidence offered as to one count would not be properly admissible for the purpose  
7 of proving another count because there is the inherent danger of jury confusion or other “spillover”  
8 effects. *See e.g., United States v. McCarter*, 316 F.3d 536, 539-40 (5th Cir. 2002).

9 Here, because the court has found that the “other acts” evidence is relevant and probative,  
10 there is no basis to sever Count 4 from this action and the defendant’s motion shall be denied as  
11 moot.

12 IT IS THEREFORE ORDERED that defendant’s motion to exclude (Doc. #120) is  
13 DENIED.

14 IT IS FURTHER ORDERED that defendant’s motion for severance is DENIED as moot.

15 IT IS SO ORDERED.

16 DATED this 10th day of May, 2013.



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19 LARRY R. HICKS  
20 UNITED STATES DISTRICT JUDGE  
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